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No. 92-1424

In The

Supreme Court of the United States

October Term, 1992

CALIFORNIA FORESTRY ASSOCIATION,

Petitioner,

v.

SALMON RIVER CONCERNED CITIZENS, CALIFORNIA COALITION FOR ALTERNATIVES TO PESTICIDES, INC., SAFE ALTERNATIVES FOR OUR FOREST ENVIRONMENT, INC., NORTHCOAST ENVIRONMENTAL CENTER, INC.,

DALE ROBERTSON, CHIEF, UNITED STATES FOREST SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

This reply brief addresses two arguments first raised by respondents in their Opposition to Petition for A Writ of Certiorari ("Opposition"). First, respondents assert that there is no conflict between the Ninth and Seventh Circuits and the Tenth Circuit regarding the specific interests necessary to satisfy the interest requirement of Fed. R. Civ. P. 24(a)(2). According to respondents, the quality of the legally protectable interests of the intervenor-applicants in *Natural*

Resources Defense Council v. U.S. Nuclear Regulatory Commission, 578 F.2d 1341 (10th Cir. 1978) ("*NRDC*"), is concrete and specific, unlike the "abstract economic interests" of petitioner California Forestry Association ("CFA"). Opposition at 7. Respondents conclude therefore that *NRDC* is consistent with the opinions of the Ninth and Seventh Circuits and argue that CFA does not have the type of economic interest that even the Tenth Circuit recognizes as sufficient to support intervention of right. *Id.* Second, respondents argue that CFA is not entitled to intervention of right because CFA "lacks standing to initiate its own NEPA suit." Opposition at 13. Both arguments are without merit and are based upon misunderstandings of the facts and the objective of Rule 24 "to achieve judicial economies of scale by resolving related issues in a single lawsuit." Opposition at 10.

I. BECAUSE THE ECONOMIC INTERESTS OF THE INTERVENOR-APPLICANTS IN BOTH THE TENTH CIRCUIT'S DECISION IN *NRDC* AND THE NINTH CIRCUIT'S DECISION BELOW ARE VIRTUALLY IDENTICAL, THESE DECISIONS, WHICH HAVE OPPOSITE HOLDINGS, ARE IN DIRECT CONFLICT.

Respondents initially argue that in *NRDC*, "the applicants for intervention had legally protected interests – licenses to mine uranium – that were threatened by the challenged proceeding." Opposition at 7. However, respondents subsequently contradict this statement when they acknowledge correctly that the intervenor-applicants in *NRDC* included both "*license applicants and potential applicants*". Opposition at 9 (emphasis added). In *NRDC* the intervenor-applicants were the Kerr-McGee Nuclear Corporation, a potential recipient of a license under the procedure at issue, and the American Mining Congress, an organization representing mining companies. 578 F.2d at 1342, 1346. The Tenth Circuit reasoned that

> the interest asserted on behalf of Kerr-McGee and the American Mining Congress is one which is a genuine threat to Kerr-McGee and the members of

> the American Mining Congress to a substantial degree.

578 F.2d at 1344-45. Thus, in finding that the interests of the intervenor-applicants before it were not merely "general and somewhat abstract" like those unsuccessfully asserted by intervenor-applicants in *Allard v. Frizzell*, 536 F.2d 1332, 1334 n.1 (10th Cir. 1976), the Tenth Circuit concluded that the quality of the interests of the intervenor-applicants before it was direct, specific and entitled to the status of a legally protectable interest.

The record in this case demonstrates that CFA, like Kerr-McGee Nuclear Corporation and the American Mining Congress, has asserted legally protectable interests. CFA represents eighty-two forest products businesses and affiliated member companies many of whom purchase, harvest and process timber from the national forests in California (*i.e.*, Region 5 of the United States Forest Service) pursuant to federal timber sale contracts and are dependent upon these forests as their sole or principal source of timber supply. *See* uncontroverted Declaration of William N. Dennison, included in the Excerpts of Record at E-10-18. As a result, CFA's members and their employees depend upon timber from the national forests of California for their livelihood. *Id.* The use of herbicides to promote tree growth, which is the subject of the EIS at issue in this case, directly affects the amount of timber that would be available to CFA's members through federal timber sales. Therefore, CFA's interests are virtually identical to those of the intervenor-applicants in *NRDC*.

The Ninth and Seventh Circuits have unequivocally held that economic interests alone – regardless of the specificity – can *never* justify intervention of right in a NEPA compliance action. *Portland Audubon Society v. Hodel*, 866 F.2d 302 (9th Cir. 1989), *cert. denied*, 402 U.S. 911 (1989); *Wade v. Goldschmidt*, 673 F.2d 182 (7th Cir. 1982). However, respondents have not denied and cannot deny that the interests of the intervenor-applicants in *NRDC*, which are virtually identical to CFA's and which the Tenth Circuit held justified intervention under Rule 24, are fundamentally economic in nature. There is a clear and direct conflict between the holdings of

the Tenth Circuit and the holdings of the Seventh Circuit and the Ninth Circuit on the issue before this Court.

II. AS A DEFENDANT INTERVENOR-APPLICANT IN THIS CASE, CFA NEED NOT DEMONSTRATE STANDING TO BRING ITS OWN NEPA COMPLIANCE ACTION IN ORDER TO INTERVENE AS A MATTER OF RIGHT.

Respondents argue that because CFA allegedly lacks standing to initiate its own NEPA compliance action, allowing CFA "to intervene would contravene FRCP 24(a)(2)'s goal of conserving judicial resources by consolidating potential litigation involving the same issues." Opposition at 15. This argument confuses the concept of standing as a threshold requirement, applicable only to plaintiffs or appellants and which must be met by a plaintiff or appellant to initiate an action, with the concept of standing as a continuing requirement applicable to both parties insofar as neither can continue in the action unless a genuine case or controversy exists which would justify the continuing jurisdiction of the federal court. Respondents would have this Court adopt an unduly narrow interpretation of Rule 24 which does not promote judicial economy and which would encourage additional related litigation over issues best resolved in a single lawsuit "involving as many apparently concerned persons as is compatible with efficiency and due process." *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967).[1]

Standing is a concept applicable directly only to plaintiffs or appellants. Article III of the Constitution requires that a party bringing suit establish the existence of a real case or controversy as a threshold requirement for access to the federal courts. *See Lujan v. Defenders of Wildlife*, 60 U.S.L.W. 4495 (U.S. June 12, 1992). However, Rule 24(a)(2) by its very nature presupposes an existing lawsuit in which a

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[1] CFA supports the EIS at issue in its present form, and opposes respondents' contentions that the EIS should address additional matters. Were the respondents' action to result in a new EIS being issued consistent with their contentions, CFA would initiate additional litigation contesting the EIS.

plaintiff has already established the existence of a real case or controversy under Article III. Rule 24(a)(2) addresses the requirements for intervention of right by defendant as well as plaintiff intervenor-applicants.

The requirements for intervention of right are set forth explicitly in the rule:

> Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a)(2). The plain language of Rule 24(a)(2) does not require that an intervenor-applicant establish standing for its interest independent of the case-or-controversy requirement of Article III, presumably already satisfied by the original parties to the action. Carried to its logical extreme, respondents' interpretation of Rule 24(a)(2) would restrict intervention of right to plaintiff intervenor-applicants in all cases on the ground that only plaintiff intervenor-applicants can establish standing to maintain a lawsuit. This is clearly not the intent of Rule 24 (a)(2).

Respondents concede that "some NEPA cases have involved intervenor-defendants" where the record allegedly remains unclear as to whether intervention was contested. Opposition at 11 n.8. However, respondents omit any discussion of *Trbovich v. United Mine Workers of America*, 404 U.S. 528 (1972), a case not involving NEPA in which intervention under Rule 24(a)(2) was contested and upheld by this Court even though the intervenor-applicant could not have brought his own suit. *Trbovich* addressed the question of whether a union official who was precluded by the Labor-Management Reporting and Disclosure Act from bringing a suit against the union had the right to intervene in the suit brought by the Secretary of Labor to enforce the statute. Significantly, the Act granted the Secretary of Labor the exclusive authority to

remedy violations of the union election procedures. 404 U.S. at 531.

The union official sought to intervene on the side of the government under Rule 24(a) in order to urge additional grounds for setting aside the election, to seek certain safeguards with respect to any new election and to present evidence and argument in support of the Secretary's challenge. 404 U.S. at 530. Despite the fact that the Act placed the responsibility for enforcement solely upon the government, the Supreme Court endorsed the union official's right to intervene under Rule 24(a)(2). Similarly here, the fact that NEPA places the obligation for compliance upon the United States cannot be read in light of *Trbovich* as precluding intervention by non-governmental parties as defendants in NEPA litigation.

In their discussion of the precedents of this Court, respondents correctly note that in *Diamond v. Charles*, 476 U.S. 54, 68-69 (1986), the Court held that in the special case where an intervenor seeks to pursue an appeal independent of one or more of the original parties to the action, the intervenor must establish that it fulfills the requirements of Article III. However, respondents omit any reference to this Court's specific reservation in *Diamond* that "[w]e need not decide today whether a party seeking to intervene before a District Court must satisfy not only the requirements of Rule 24(a)(2) but also the requirements of Art. III." 476 U.S. at 69.

In *Diamond* the Court noted that "the precise relationship between the interest required to satisfy [Rule 24(a)(2)] and the interest required to confer standing has led to anomalous decisions in the Courts of Appeals." 476 U.S. at 68. However, a substantial number of circuits, including the Ninth Circuit, have expressly declined to impose an independent standing requirement upon intervenor-applicants. In *Portland Audubon Society v. Hodel*, 866 F.2d 302 (9th Cir.), *cert. denied*, 492 U.S. 911 (1989), the Ninth Circuit declined to "incorporate an independent standing inquiry into our circuit's intervention test." *Id.* at 308 n.1. Likewise, the Eleventh Circuit has expressly rejected the independent standing requirement for

intervention: "We therefore hold that a party seeking to intervene need not demonstrate that he has standing in addition to meeting the requirements of Rule 24 as long as there exists a justiciable case and controversy between the parties already in a lawsuit." *Chiles v. Thornburg*, 865 F.2d 1197, 1213 (11th Cir. 1989).

Respondents' position also has been rejected, either explicitly or implicitly, by the Second, Sixth, and Eighth Circuits, and by district courts in New York and Massachusetts. *See Purnell v. City of Akron*, 925 F.2d 941, 948 (6th Cir. 1991) ("[a] party seeking to intervene need not possess the standing necessary to initiate a lawsuit"); *United States Postal Service v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978) ("[t]he existence of a case or controversy having been established as between the Postal Service and the Brennans, there was no need to impose the standing requirements upon the proposed intervenor"); *Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action*, 558 F.2d 861 (8th Cir. 1977) (issue of intervention resolved without reference to standing); *Authors League of America, Inc. v. Ass'n of American Publishers*, 619 F. Supp. 798, 806 (S.D.N.Y. 1985) ("[i]f a plaintiff establishes standing, the plaintiff-intervenor need not demonstrate an independent basis for standing to assert its representative claims"), *aff'd on other grounds sub nom. Authors League of America, Inc. v. Oman*, 790 F.2d 220 (2d Cir. 1986); *Avery v. Heckler*, 584 F. Supp. 312, 316 n.3. (D. Mass. 1984) ("[a]n intervenor need not have the standing necessary to initiate the lawsuit"), *aff'd on other grounds sub nom. Avery v. Secretary of Health and Human Services*, 762 F.2d 158 (1st Cir. 1985).

While respondents assert that some other circuits have adopted the independent standing test, a closer reading of the decisions cited by respondents demonstrates no wholesale incorporation of a standing requirement in intervention cases. For example, *Cook v. Boorstin*, 763 F.2d 1462 (D.C. Cir. 1985), cannot be construed as a blanket endorsement that an intervenor must always establish standing before intervention

may be granted.[2] Indeed a closer reading of that case demonstrates that it belongs to that class of cases which holds only that an intervenor who pursues claims beyond those originally claimed or seeks to appeal on its own after intervening must independently establish standing.

In *Cook* employees of the Library of Congress sought to intervene as plaintiffs and additional class members in an ongoing class action discrimination suit under Title VII. The government opposed the employees' motion for intervention on the ground that these employees failed to meet the "interests in transaction" standing test because they held a variety of different jobs under different promotion and advancement schemes from those contested by the original plaintiffs. The Court rejected this argument:

> [T]he Library builds an elaborate argument that to intervene of right a party must have standing to challenge or defend the precise actions challenged by the original plaintiffs. This is certainly an interesting interpretation, but the case [*SCLC*] quite plainly says nothing of the kind.
>
> Such a restriction on intervention finds no support in *SCLC v. Kelley*, nor in any other cases of which we are aware, nor, for that matter, in common sense. The whole point of intervention is to allow the participation of persons with interests distinct from those of the original parties.

Id. at 1470-71.

Likewise, the D.C. Circuit opinion in *Southern Christian Leadership Conference v. Kelley*, 747 F.2d 777 (D.C. Cir. 1984) ("*SCLC*"), cannot be construed as approving a blanket requirement that an intervenor must satisfy standing. Instead, that case turns on an unusual set of facts, and, more appropriately, stands only for the proposition that a party who wishes to continue a case on its own must demonstrate that it has standing.

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[2] The quotation in *Cook* that respondents reference ("an intervenor of right, just like an ordinary plaintiff, must have standing . . . ") (Opposition at 15) is *not* the holding in *Cook*, but merely *dicta* characterizing the opinion in *Southern Christian Leadership Conference v. Kelley*, 747 F.2d 777 (D.C. Cir. 1984).

In *SCLC*, Senator Jesse Helms sought to intervene *six years after judgment* in two consolidated cases arising out of the FBI's electronic surveillance of Dr. Martin Luther King, Jr.[3] Senator Helms moved to intervene to *reopen* the matter in order to obtain access to the surveillance tapes. He argued that access to the tapes would better inform him and the rest of the Senate during the Senate's deliberation of a bill to designate Dr. King's birthday as a national holiday. The D.C. Circuit found that Senator Helms lacked any protectable interest and thus lacked standing. Viewed in this context, the decision does not equate with a requirement that an intervenor in an *on-going* case or controversy, such as the present case, must establish standing in order to intervene.

The only apparent support for respondents' position is found in the Seventh Circuit. Yet even that circuit has stated that "[t]he requirements for intervention, moreover, should generally be more liberal than those for standing to bring suit." *United States v. Board of School Commissioners, Indianapolis, Ind.*, 466 F.2d 573, 577 (7th Cir. 1972), *cert. denied*, 410 U.S. 909 (1973); *see United States v. City of Chicago*, 870 F.2d 1256, 1260 (7th Cir. 1989) (white females' confident expectation of being promoted constituted sufficient interest for intervention in a discrimination suit).[4]

Contrary to respondents' contention, allowing CFA intervention in this action would not increase the complexity of the action without any corresponding benefit. Opposition at 17. There is nothing in the record to support respondents'

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[3] In the underlying case, the district court had dismissed as time barred the plaintiffs' claims for damages for the surveillance, but accepted the parties' agreement that the tapes should be sealed for 50 years. 747 F.2d at 228.

[4] *Solien v. Miscellaneous Drivers & Helpers Union, Local No. 610*, 440 F.2d 124 (8th Cir. 1971), cited by respondents for the proposition that an intervenor-applicant must establish standing, must be deemed no longer valid since it was decided one year prior to this Court's decision in *Trbovich*, 404 U.S. 528 (1972), and six years before *Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action*, 558 F.2d 861 (8th Cir. 1977), where the Eighth Circuit resolved the issue of intervention without reference to standing.

assertions that CFA's intervention would in any degree significantly increase the workload of the court or of the existing parties. In any event, the district court retains full discretion under Rule 24(a)(2) to limit CFA's participation in any of these respects if appropriate after intervention is granted.[5] Moreover, CFA has stated multiple specific interests which would justify intervention of right in this action. These interests include economic and noneconomic interests any of which provide an independent basis for intervention of right. Petition at 3.[6]

CONCLUSION

For each of the foregoing reasons and the reasons set forth in its Petition for A Writ of Certiorari, CFA's petition should be granted.

Respectfully submitted,

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[5] "An intervention of right under [Rule 24 (a)] may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings." Fed. R. Civ. P. 24 (Notes of Advisory Committee on Rules, 1966 Amendment).

[6] Respondents' argument that permitting intervention by CFA based upon CFA's interests in the proper interpretation of NEPA would open the flood gates and allow anyone to intervene in every NEPA action is unfounded. *See* Opposition at 17. CFA's interests in the proper interpretation of NEPA are virtually identical to the interests asserted by plaintiffs to establish their standing in this litigation. CFA's economic and noneconomic interests are specific and not generalized as described in detail in the record below. *See* Declaration of William N. Dennison, included in the Excerpts of Record at E-10-18.